

the 8 day of October, 2003
TESTE: LILLIE M. HART, CLERK 3:50pm
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,)	
)	CR 03-3089
)	CR 03-3090
v.)	CR 03-3091
)	Hon. Jane Marum Roush
)	
LEE BOYD MALVO,)	
Defendant.)	

**MOTION TO EXCLUDE STATEMENTS MADE BY DEFENDANT DURING
INTERROGATION ON NOVEMBER 7TH, 2002**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and moves this Court pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article One, Sections 8 and 11 of the Virginia Constitution, and Virginia Code Rules 3A:11 and in support thereof states the following:

1. Lee Boyd Malvo is charged in Fairfax County with the premeditated murder of Linda Franklin pursuant to §18.2-31(8) as well as § 18.2-31(13) (killing in the commission of an act of terrorism), and unlawful use of a firearm while committing the murder of Linda Franklin pursuant to §18.2-53.1 of the Virginia Code (1950), as amended.
2. On November 7, 2002, the Defendant was interrogated by Fairfax County Detective June Boyle and FBI Agent Brad Garrett for several hours.
3. The Defendant is entitled to copies of any "written or recorded statements" made by him during the November 7th interrogation as well as "the substance of any oral statements" that were not written or recorded,

pursuant to Rule 3A:11 of the Code of Virginia. On January 8, 2003, based on a prior order of The Juvenile and Domestic Relations General District Court, the Commonwealth's Attorney was ordered to produce such materials, pursuant to Rule 8:15 (b) of the Code of Virginia. On March 3, 2003, this court ordered that same material to be produced by April 14, 2003.

4. On January 8, 2003, the Commonwealth's Attorney supplied defense counsel with 5 audio tapes, transcripts of those tapes (1st tape - 24 pages, 2nd tape - 21 pages, 3rd tape - 19 pages, 4th tape - 19 page, 5th tape - 8 pages), and a six-page document entitled "Substance of Oral Statements." These materials, taken together, purportedly covered the entire interrogation of the Defendant by Detective Boyle and Agent Garrett. Defense counsel was informed by the Commonwealth's Attorney that the "Substance of Oral Statement" document covered the entire unrecorded portion of the interrogation.
5. However, in April 2003 defense counsel acquired from the Washington Post an 11-page summary of an oral statement made by the Defendant to Detective Boyle and Agent Garrett during the first hour of the interrogation. The additional summary was a far more comprehensive summary of Defendant's statement than that which had been previously provided by the Commonwealth's Attorney on January 8, 2003, and to date the Commonwealth's Attorney has still not provided defense counsel with a supplemental substance of oral statements.

6. On April 16, 2003, the Commonwealth's Attorney, in its response to Defendant's Motion for Full and Complete Disclosure of Discovery Materials, stated that "the defense is entitled to the substance of oral statements made by the Defendant which the Commonwealth's Attorney had already provided."
7. The transcript of tape 5 stops mid-conversation. The audio tape likewise stops at the same point in the interrogation. In June 2003 defense counsel discovered that on high volume, and using headphones, it was possible to discern a continuing conversation on tape 5. Defense counsel attempted to have the tape enhanced to discover the full content, however, due to the poor quality of the copy provided, the defense was unable to enhance the provided tape.
8. *Prior* to the discovery of the continuing conversation on tape 5, defense counsel on March 31, 2003 filed a Motion for the Appointment of a Voice/Audio Expert, but the Commonwealth's Attorney objected and the court denied the defense motion.
9. On August 28, 2003, defense counsel, after requesting, to no avail, that the Commonwealth's Attorney provide an enhanced version, filed a Motion to Order Sound Enhancement of Untranscribed Portion of Audiotape. On September 9, 2003, the Commonwealth's Attorney supplied defense counsel with a tape, however it to was unintelligible -- even when listened to through headphones and with Dolby noise reduction.
10. On September 17, 2003, the Commonwealth's Attorney supplied defense

counsel with *another* tape 5 which was asserted to be “enhanced.” The Commonwealth further stated in court that they would also provide defense counsel with a transcript of that part of the interrogation that was unintelligible.

11. This third version of tape 5 provided by the Commonwealth’s Attorney, although enhanced to be louder, is still largely unintelligible. However, parts of the tape can be deciphered and it is in fact what defense counsel expected -- a continuation of the interrogation.
12. Defense counsel has determined that the interrogation continued for an additional fifteen minutes (15) during which the Defendant can be heard answering Detective Boyle’s questions. A portion of the tape that defense counsel has been able to hear and understand the follow as such:

A. Malvo: I said I won’t
 Boyle: You told me you could change your mind. You told
 me you could change your mind as long as you say
 it, right? Then, ok I am changing my mind.
 Malvo: _____
 Boyle: No, you were telling me that.
 Malvo: No, unless you tell the person you gave your word to
 you were going to change your mind. Change my mind
 now.
 Boyle: But I don’t think he would mind at this point in time,
 really.
 Malvo: **It’s my word, I won’t....**

B. Malvo: They’re going to lock me up, about seven years and
 _____ about seven years. My dad....
 Boyle: That’s what you think?
 Malvo: As fast as possible _____.
 Boyle: Pardon me.
 Malvo: Their going to get rid of him as fast as possible.
 Boyle: Oh, oh your friend?
 Malvo: My father, he is.

Boyle: Is that what you consider him?
Malvo: Weight of the world.
Boyle: The world is your dad.
Malvo: **Might as well protect him.**

13. To date, defense counsel *still* have not received a comprehensible portion of tape 5, a complete transcript of tape 5, or a "Substance of Oral Statement" concerning the defendant's statements during that portion of the interrogation -- even though numerous members of law enforcement observed the interrogation, including but not limited to: Detectives Boyle, Flannagan, Shillingford, Bond, Harris, Wallace, Toney, Miller, Walker, Walburn; Agent Garrett; Major Lomonaco; Major Kitzerow and Lieutenant Guth, some of whom were taking notes.
14. Therefore, there exists a portion of the Defendant's statement to law enforcement that has not been made available to defense counsel either as an audio tape or a transcript, nor even reduced to a "Substance of Oral Statement." This omission on the part of the Commonwealth is a violation of both the juvenile court order and the order of this court issued March 3, 2003.
15. Furthermore, defense counsel has determined, based on the content of tape 5 that *can* be deciphered, that the Defendant has been prejudiced by the delay in receiving the full substance of his statements to law enforcement.
16. Irrespective of the good faith of the prosecution, the suppression or withholding by the prosecution of evidence favorable to the accused upon request violates Due Process when the evidence is material either to guilt or to punishment. Lowe v Commonwealth 218 Va. 670, 239 S.E. 2d 112, cert. denied, 435 U.S. 930 (1977).

17. The Defendant's trial date is just over a month away, and the defense is still without his complete statements. In addition, due to the Commonwealth's failure to provide the material, the defense has only recently learned that Defendant told law enforcement that *he was going to protect his father* and suggested to his interrogators that *he practiced what he was going to say to law enforcement*. Undoubtedly, this information is crucial to the defense case. However, due to the delay by the Commonwealth's Attorney in producing the discovery, there is simply no time to investigate completely the leads created by these newly discovered statements.
18. The Defendant has been prejudiced by not having the full extent of his statements provided to him in a timely fashion pursuant to Rule 3A:11 of the rules of discovery and the orders of this and the juvenile court. In addition, defense counsel's strategy as to the presentation of the case, their requests for the appointment of experts, and their investigation have been irreparably prejudiced.

WHEREFORE, Lee Malvo, through his defense counsel, respectfully requests that this Honorable Court enter an order preventing the Commonwealth's Attorney from using the Defendant's statements to Detective June Boyle and Agent Robert Garrett on November 7, 2002.

Respectfully submitted,
LEE BOYD MALVO

By _____
Co-Counsel

and

By _____

Co-Counsel

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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
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and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
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4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 8th day of October, 2003.

Co-Counsel

Co-Counsel